No. 12102

In the United States Court of Appeals for the Ninth Circuit

JOE BALESTRIERI AND COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 69–83) is unreported.

JURISDICTION

This petition for review (R. 86–92) involves federal excess profits taxes for the taxable year 1943. On October 8, 1946, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of $25,021.70. (R. 5.) Within ninety days thereafter and on January 6, 1947, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code. (R. 4–8.) The decision of the Tax Court sustaining

the deficiency was entered August 3, 1948. (R. 84.) The case is brought to this Court by a petition for review filed November 1, 1948 (R. 86–92), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. Where taxpayer agreed to "underwrite" any losses which another corporation might suffer as a result of discounting invoices of and lending money to a partnership, was taxpayer a mere guarantor for the debt of the partnership, as the Tax Court held, and therefore entitled to no deduction under Section 23 (f) of the Internal Revenue Code for the losses suffered since no payment in the taxable year of the obligation guaranteed has been shown?

2. If it should be held or assumed that the taxpayer became a participant in a joint venture with the partnership, as the taxpayer contends, has it proved the net loss of the venture for 1943 and its distributive share thereof, so as to be entitled to a deduction under Sections 182 (c) and 183 (b) of the Internal Revenue Code?

3. Did the Tax Court abuse its discretion where taxpayer's original counsel was found not to be admitted to practice before the Tax Court when it refused substituted counsel's request for more time to prepare his case for hearing?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations may be found in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

Petitioner is a California corporation, a wholesale dealer in fish. Its capital stock in the taxable year, 1943, was wholly owned by Joe Balestrieri, president of petitioner, and W. E. Otto, vice-president, and the members of their immediate families. Both were members of petitioner's board of directors. (R. 69–70.)

Early in the summer of 1943, a mining engineer, J. M. Hoff, approached Otto, in his individual capacity, with a proposition for the mining and milling of chrome ore. Thereafter, Otto introduced Hoff to Balestrieri, and, following conversations which convinced Otto and Balestrieri of the possibilities of very large profits, the three executed articles of copartnership. (R. 54–56, 70.)

The agreement provided that each would have an equal interest and share of the profits in the partnership, the purpose of which was to engage "in the business of prospecting for, buying and selling mines and interests in mines, metals, strategic materials of all kinds and characters, and mining machinery and equipment, and to perform services in the nature of mining engineering." Hoff was to devote his full time to the carrying on of the business of the partnership. Balestrieri and Otto were to provide an office, travelling expenses for Hoff, and money with which to maintain himself for a period of six months. Balestrieri and Otto were to be reimbursed for these

expenses. Shortly after the making of the agreement, a "Certificate of Co-Partners Transacting Business Under Fictitious Name"[1] was filed with the county clerk in San Francisco, certifying that the three were all members of the partnership. (R. 56–57, 70–71.)

Balestrieri and Otto had had dealings with the Pacific Vegetable Oil Corporation, hereinafter called Pacific, which Otto approached on behalf of the partnership to secure finances for operations. After a conversation with one of the officers of that corporation, Otto, on behalf of the partnership, wrote Pacific confirming a conversation wherein Pacific had agreed to finance "the purchase of Chrome ore and milling and the discounting of the invoices." (R. 71–72.) Pacific was to receive twenty-five percent of the net earnings of the partnership; when financing of operations by Pacific was no longer necessary, it was to receive ten percent of the partnership's net. Losses were to be covered by the partnership. (R. 73–74.)

Pacific indicated that it would agree to the proposition outlined by Otto, provided taxpayer's board of directors would agree to "underwrite" any loss which Pacific might sustain as a result of its discounting any invoices of the partnership. (R. 75.)

Thereupon Otto wrote taxpayer in behalf of the partnership (R. 75–76), offering—

> a one-half participation in any profits that the Strategic Mineral Exploration Company [partnership] may earn. * * *

---

[1] Strategic Minerals Exploration Co.

> The consideration for this offer is that your corporation agrees to guarantee the payment of any losses or deficits that may occur on the money borrowed from the Pacific Vegetable Oil Corporation on our chrome milling venture.
>
> In the event that you decide to participate in this venture, please have your Board of Directors ratify same and formally confirm same to us in writing.

On July 26, 1943, the directors of taxpayer (Balestrieri and Otto) held a meeting, the minutes of which are in part as follows (R. 76–77):

> 2. The letter addressed to the corporation by the Strategic Minderal [sic] Exploration Company was submitted and the proposal to participate in one-fourth of the earnings of the Chrome Milling venture at Castella was accepted. The corporation in turn guaranteed any losses or deficits that may occur on money borrowed from the Pacific Vegetable Oil Corporation on the crome [sic] milling venture.
>
> 3. It was ordered and directed that the president accept the offer.
>
> 4. * * * it was unanimously voted and approved to accept and confirm all the above.

A mistake was made in these minutes, prepared by a daughter of Balestrieri, in that the minutes referred to "one-fourth of the earnings of the Chrome Milling venture" instead of "one-half." (R. 77.)

On the same day taxpayer wrote to the partnership (R. 78) stating—

> Please be advised that we herewith accept this proposal of yours to participate in the

> profits of your chrome milling operation and we in turn guarantee any losses should they occur.

Taxpayer's board of directors having taken this action, Pacific consented to and did discount invoices of the partnership in accordance with the proposal noted. (R. 78.)

Before the end of 1943, the partnership had lost approximately $39,000. The partners decided to cease operations and to liquidate the partnership business. Considerable bitterness developed between Balestrieri and Otto on the one hand and Hoff on the other. Hoff refused to assume any responsibility for the losses of the partnership and "walked out on" the other two. (R. 78–79.)

There was due to Pacific, on account of its dealing with the partnership, $22,229.37. In 1943, taxpayer executed its note for that amount to Pacific, but payments thereon were not made by taxpayer until the following year. The other unpaid bills of the partnership, in the approximate sum of $17,000, were paid gradually by Balestrieri and Otto. (R. 79.)

The Commissioner determined a deficiency in excess profits taxes for the year 1943 of $25,021.71. The only error alleged below by taxpayer was the Commissioner's disallowance of the deduction of the loss of $22,229.37, "resulting from a business venture between petitioner [taxpayer] and Strategic Mineral Exploration Co., a partnership." (R. 69.) The Tax Court on these facts found that taxpayer had entered not into a joint venture with the partnership but had

entered into a contract of guaranty, and was therefore secondarily liable. Accordingly, no deduction could be allowed, taxpayer having failed to prove any payment in the taxable year which would give rise to any indebtedness to taxpayer on the part of the members of the partnership who were primarily liable on the obligation to Pacific, and, even if such an indebtedness had been created, there was no proof that it was worthless in the taxable year. (R. 69–83.)

Taxpayer appealed from this decision to this Court.

SUMMARY OF ARGUMENT

By California law, a guarantor is one who answers for the debt, default, or miscarriage of another. This is a secondary obligation, its effect to be interpreted in accord with the rules for interpretation of other contracts. The parties herein used the word "guarantee" extensively; while this is not conclusive, it is entitled to great weight in determining the intentions of the parties to the agreement in question. The use of words of guaranty coupled with evidence adduced at the hearing sustains the Tax Court's conclusion that taxpayer entered into an agreement of guaranty.

Taxpayer's argument that there can be no guaranty where the promise is made to the principal debtor is illogical, and depends upon constructions of the Statute of Frauds which is not involved. Taxpayer's promise was to answer for the debt of someone other than itself and therefore comes within the statutory definition.

In any event, in substance the promise of guaranty was to Pacific. The real consideration moved to Pacific and from it. In reliance upon the contract of guaranty, Pacific advanced funds to the partnership.

Where there is nothing but an agreement to share profit and loss, assuming that the agreement is not a guaranty, it cannot be considered a joint venture, because there is no joint carrying on of a business by joint venturers within the applicable Regulations or in accord with other harmonious authorities.

The sums advanced were not advanced to taxpayer but to the partnership, in reliance upon the guaranty. This does not constitute a loan to the guarantor.

Taxpayer, being on the cash receipts and disbursements basis of accounting for federal income tax purposes, cannot claim a loss deduction on the guaranty agreement where no payment was made in the taxable year.

Even assuming the taxpayer was a participant in a joint venture, there is no showing in the record that the joint venture suffered a loss in 1943, so as to entitle taxpayer to deduct his distributive share thereof in 1943.

The Tax Court did not abuse its discretion in denying the request of taxpayer's counsel for more time in which to prepare taxpayer's case. Counsel had sufficient time in which to prepare for a hearing, although the time allowed was not extensive. In any event, the denial was not prejudicial, since ample evidence was adduced to fairly present the issues.

ARGUMENT

I

Taxpayer was a guarantor of the partnership's obligation to Pacific on the milling venture, and sustained no deductible loss in the taxable year since no payment was made in that year on the guaranty, a secondary obligation

The Tax Court found that taxpayer was but a guarantor of the liabilities of the partnership to Pacific, with the secondary liability incident to a guaranty. Accordingly, taxpayer who reported on the cash receipts and disbursements basis of accounting (R. 69) was allowed no deduction for its payments of the amounts due Pacific within Section 23 (f) of the Internal Revenue Code (Appendix, *infra*), since it failed to prove any payment in the taxable year of the obligation guaranteed. Moreover, assuming that as a result of payments made on the guarantee an indebtedness was shown to have arisen, there was no proof that the indebtedness of the three partners to taxpayer became worthless in 1943, the taxable year, so as to merit deduction under Section 23 (k) (1) of the Internal Revenue Code (Appendix, *infra*). Taxpayer pitches his case on the theory that the agreement it entered into was an agreement of joint venture, constituting taxpayer one of two joint venturers with the partnership and that accordingly since the venture sustained a loss in the taxable year, taxpayer, as one of the venturers, was entitled to deduct its distributive share of the loss under Section 182 (c) of the Internal Revenue Code (Appendix, *infra*), joint ventures being classified for tax

purposes with partnerships under Section 3797 (a) (2) of the Internal Revenue Code (Appendix, *infra*).

It is our position that (1) the evidence fully sustains the Tax Court's finding that the taxpayer merely guaranteed payment of the partnership's debt to Pacific, but (2) even assuming that the taxpayer became a joint venturer in the partnership's business, it still is not entitled to deduct the claimed loss because the "venture" is not shown to have sustained a loss in 1943 within the meaning of Sections 182 and 183 of the Internal Revenue Code.

Whatever the agreement in question is to be termed, it was made in California, and it is therefore pertinent to examine California law on the subject.

By legislation, California has abolished the distinction which has gained favor in many American jurisdictions between guaranty and suretyship. California Civil Code, Section 2787 (Appendix, *infra*), further provides that—

> A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor.

This is consistent with the earlier California definition of a guaranty, found in *Lightstone* v. *Laurencel,* 4 Cal. 277, where the court held that a guarantor or indorser is one—

> who undertakes for the obligation of another, taking upon himself the fulfillment thereof, in case of the non-compliance of the party contracting.

A similar definition later was adopted by statute. Prior to 1939 a guaranty, as opposed to a suretyship, was a "promise to answer for the debt, default, or miscarriage of another person." See California Civil Code, Section 2787 (Deering, 1937). Most of the former sections dealing with guaranty are retained subsequent to 1939, their amendment if any made to conform them to the amended terminology set out in Section 2787. The basic abolition that took place in 1939 was of what formerly had been deemed suretyship. Although the Civil Code now speaks of suretyship where formerly it used the term guaranty, it is obvious that prior constructions will control where amendment is only the slight change of terminology. Accordingly, the question of whether there is a guaranty or an original promise, a secondary as opposed to a primary liability, is essentially one of fact; interpretation of a written contract is a question for the court. *Harris* v. *Frank,* 81 Cal. 280, 286, 22 Pac. 856, 858; see *Ingalls* v. *Bell,* 43 Cal. App. 2d 356, 366–368, 110 P. 2d 1068, 1074–1076; 2 Williston on Contracts, Sec. 465; cf. *Kilbride* v. *Moss,* 113 Cal. 432, 45 Pac. 812. Section 2837 of the Civil Code provides that a contract of surety, and therefore a guaranty agreement, is to be interpreted under the same rules as apply to the construction of other contracts. As the California Supreme Court has said in *Everts* v. *Matteson,* 21 Cal. 2d 437, 448, 132 P. 2d 476, 483—

> the terms of the instrument and the circumstances under which it was made determine the character and extent of the undertaking.

> * * * The contract will be fairly construed to effect the object for which it was given and to accomplish the purpose for which it was designed * * *, and the use of the word "guaranty" in the instrument is not conclusive in determining its character.

It is clear, however, that use of the word "guaranty" or "guarantee" is entitled to great weight as evidence of what the parties intended.

A classification of the agreement made by taxpayer herein is made difficult by the fact that the agreement was made by laymen without regard for legal refinements. Nevertheless, the Tax Court's conclusion that what is involved is a guaranty seems the logical conclusion.

In the correspondence between taxpayer and the partnership and in the minutes of the meeting of taxpayer's directors, the word "guarantee" was used exclusively in referring to taxpayer's obligation. (R. 75–78.) Although not conclusive, the use of the word is important, particularly in view of the fact that the agreement was made after Pacific indicated it would loan money to the partnership if taxpayer would agree to "underwrite" any loss. (R. 75.) Both words connote a collateral, insuring agreement, particularly where applied to a prospective debt of another than the guarantor or underwriter.

It is pertinent to emphasize that the agreement was made at the insistence of Pacific, which believed the partnership a poor credit risk. To procure a guaranty of its credit, the partnership sought out taxpayer, offered it what the partnership thought a

"very liberal" (R. 27) right of profit-participation in return for a guaranty. Not only did the written agreement refer to the arrangement as a guaranty by taxpayer in consideration of a percentage of the profits earned by the partnership, but Otto emphasized in his testimony that the arrangement was intended as a guaranty. Thus he testified that Rocca of Pacific insisted upon a guarantee by taxpayer (R. 37); accordingly, a guarantee or guaranty was sought. The guaranty was for the protection of Pacific. (R. 37–38.) The protection Pacific demanded was tendered for the purpose of enabling the *partnership* to borrow money. (R. 39, 41.) Taxpayer was to "stand behind the deal for us." (R. 42.) "The money was loaned to the partnership, and then in turn was guaranteed by Balestrieri and Company." (R. 43.) It is not without significance that one of the purposes of the agreement was the accommodation of the partnership. (R. 45, 46–47.) And Balestrieri testified that the guaranty was to apply to money borrowed from Pacific, "to guarantee they would be paid back" (R. 49), the basic purpose of the normal guaranty.

These facts bear out the Tax Court's conclusion that taxpayer intended to be and was a guarantor. Taxpayer argues that the contract cannot be a guaranty because it was made between the principal debtor and the guarantor. The base upon which his argument is bottomed is that a promise to answer for the miscarriage of another must be a promise to the creditor, and that therefore a promise to the principal

debtor must be something else than a guaranty. It is clear that a promise to the debtor is not within the Statute of Frauds. *Garroway* v. *Jennings,* 189 Cal. 97, 207 Pac. 554. Therein the promisor contracted to pay the creditors of the debtor in consideration of an assignment of debtor's judgment to him. The court held there was involved an original promise within Section 2794 of the California Civil Code which was therefore not required to be in writing under Section 2793. Accord: Restatement, Contracts, Section 180, Illustration (9). But this case does not involve the question of whether the agreement to answer for the debt of the partnership was enforceable under the Statute of Frauds. Moreover, the rule noted immediately above is a result of constructions of the Statute with a mind to the evils it sought to correct.[2] Here the taxpayer recognized its obligation, which in any event was in writing.

The mere fact, even if true, that the promise to guarantee the partnership's debt was made only to the partnership is irrelevant here. Regardless of the promise, the contract is for the benefit of the creditor directly or indirectly. This is particularly in point

[2] The principal evil has been the ease with which creditors had been able to prove by false testimony that credit was given in consideration of a guaranteeing agreement. C could easily prove the debt of P; false testimony was used to prove that G had promised to guarantee P's debt. The evil practices could occur only where the creditor was the promisee or claimed to be. Therefore, the courts concluded that a promise to the principal debtor was not within the Statute, although it is a valid, binding agreement. Arant, Suretyship, Section 32. See 2 Williston on Contracts (Rev. ed., 1936), Sections 460, 461.

in the case at bar, where the creditor would not in fact have made advances to the partnership unless it was protected by the guaranty of taxpayer. (R. 23.) Even assuming that in form, the promise was made to the partnership, the principal debtor, the consideration certainly flowed to the creditor, Pacific. And certainly Pacific's action in reliance on the guaranty is sufficient acceptance by it of the guaranty agreement. Indeed, in any event, it seems a required conclusion that the promise was in fact made to Pacific, although the letter of acceptance of the offer of the partnership to taxpayer to participate in the profits in return for the guaranty was addressed to the partnership. All the parties concerned knew that the letter would be the basis of an agreement with Pacific under which it would loan the partnership money and it subsequently was such a basis. The only logical conclusion is that in substance the guaranty was to Pacific. If the contract was one of guaranty, or was not solely because made to the partnership alone, it was still a contract whereby the partnership was benefited by enabling it to incur debts. For if the contract was one of guaranty, or was not solely because made to the partnership, it seems eminently clear that taxpayer had a right of reimbursement from the partners. In this connection, it may be pointed out that it is highly doubtful that taxpayer, controlled by Otto and Balestrieri, would wish by their guaranteeing agreement to release Hoff from obligation to repay. The presence of Hoff in the partnership lends considerable weight to the Tax

Court's finding that the intention was that taxpayer would guarantee its credit. It is true that the partnership was aided by the guaranty, as is any guaranteed debtor. But the real consideration moved to and from Pacific. In substance, the promise of guaranty was to Pacific.

Taxpayer contends that the agreement constituted an agreement of joint venture between taxpayer and the partnership. The authorities do not bear out such a conclusion. A joint venture is very similar to a partnership, and is considered a partnership for tax purposes under Section 3797 (a) (2) of the Internal Revenue Code, *supra*. It is implicit in both the statute and Section 29.3797–4 of Treasury Regulations 111 (Appendix, *infra*) that a joint venture is an association of persons to carry on a business or financial venture or operation. A further essential requirement is a joint management and control. *Tompkins* v. *Commissioner,* 97 F. 2d 396 (C. A. 4th). This concept of a joint venture is also the rule generally and in California. *Porter* v. *Cooke,* 127 F. 2d 853 (C. A. 5th), certiorari denied, 317 U. S. 670, rehearing denied, 317 U. S. 710; *Chisholm* v. *Gilmer,* 81 F. 2d 120 (C. A. 4th), affirmed, 299 U. S. 99; *Nelson* v. *Abraham,* 29 Cal. 2d 745, 177 P. 2d 931; *Spier* v. *Lang,* 4 Cal. 2d 711, 53 P. 2d 138; *Howard* v. *Societa di Unione, etc., Italiana,* 62 Cal. App. 2d 842, 145 P. 2d 694; *Wallace* v. *Pacific Electric Ry. Co.,* 105 Cal. App. 664, 288 Pac. 834; *Brenner* v. *Plitt,* 182 Md. 348, 34 A. 2d 843; *Griffiths* v. *Von Herberg,* 99 Wash. 235, 169 Pac. 587.

In this case there is at most an agreement by taxpayer to underwrite a particular obligation of the partnership in return for a stated percentage of its profits. There is no association of corporation and partnership to "carry on" a business, operation, or venture, no joint participation. In this connection it is significant that neither witness testified that a joint venture was formed. Taxpayer contends that there is common management. There is common management of the taxpayer and the partnership, but there is no common management of a venture by the taxpayer and the partnership. There is no evidence in the record that taxpayer as a corporation participated in the operations of the milling venture. It is true that Otto and Balestrieri as two of the three partners were also controlling stockholders of the taxpayer, but there is no evidence to indicate that they were authorized to bind the taxpayer as a participant in the chrome milling venture except in respect of the money advanced by Pacific. There is no evidence that the partnership could bind the taxpayer in other contracts or that the taxpayer entered into others or into the management of the venture. If contrary to the proper rule (*Moline Properties, Inc. v. Commissioner,* 319 U. S. 436) the corporate entity of taxpayer is disregarded to permit the conclusion that the actions of Otto and Balestrieri are to be deemed to have been taken both as partners and on behalf of the taxpayer corporation as a joint venturer, it is only logical to conclude that Otto and Balestrieri did not contract with themselves as cor-

poration with partners, but as partners pledged the assets of the corporation to secure loans from Pacific. This, however, does not make the taxpayer corporation a joint venturer. The weakness of taxpayer's argument as to common control is shown clearly when it is considered that taxpayer is bound on the agreement; had Otto and Balestrieri sold out their interests in taxpayer, it would still be bound and any semblance of common control would have evaporated. If there were a real joint venture, the mere change of stock holdings in the corporation could not change its status as a joint venturer. One of the salient features of a corporation is, after all, its ability to continue as an entity despite changes in its stock ownership.[3]

Taxpayer argues (Br. 15) that taxpayer was "in substance, the real borrower of the money." In this connection it relies on *Garroway* v. *Jennings, supra.* But that case is distinguishable in that all consideration moved as between the principal debtor and the guaranteeing promisor. Herein the creditor agreed to loan money to the principal debtor, the partnership, in reliance on taxpayer's promise of guaranty. This was not in substance a loan to taxpayer. It was a loan to the partnership which was to and did use the money in furtherance of its chrome milling venture. An

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[3] It may be noted that the record shows no filing of a partnership information return under Section 187 of the Code for the taxable year, either by the partnership or by the partnership and taxpayer as joint venturers. This may be an indication that no joint venture was intended. Cf. *Rota-Cone Oil Field Op. Co.* v. *Commissioner*, 171 F. 2d 219 (C. A. 10th).

examination of substance reveals not only a loan to the partnership but a guaranty to Pacific. Furthermore, Otto testified that the money was lent to the partnership. (R. 43. Cf. Balestrieri testimony, R. 47, 49.)

Taxpayer reported its income for the year 1943 on the cash receipts and disbursements basis for federal income and excess profits tax purposes. Taxpayer gave its note for the amounts due Pacific in November of that year but the Tax Court found (R. 79) that no payments were made on the note in 1943.[4] It is well established that where a taxpayer is on the cash basis, he may not take a deduction for loss upon a contract of guaranty unless he actually makes payment under this guaranty. The giving of a note, moreover, is not the equivalent of cash so as to entitle a cash basis taxpayer to claim a payment. *Helvering* v. *Price,* 309 U. S. 409; *Eckert* v. *Burnet,* 283 U. S. 140; *Jenkins* v. *Bitgood,* 101 F. 2d 17 (C. A. 2d), certiorari denied, 307 U. S. 636; 2 Mertens, Law of Federal Income Taxation, Sections 28.70, 28.71. Even assuming that taxpayer contracted to pay all losses, payment still is necessary to entitle a cash basis taxpayer to a deduction.

Accordingly, it follows that taxpayer cannot claim a deduction for its obligation to Pacific, since nothing was paid on the obligation in the taxable year. Moreover, as the Tax Court pointed out, there is no evidence that taxpayer's right of reimbursement on its

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[4] It was conceded at the hearing that if any payments were made in 1943, they were trivial (R. 16, 52).

liability on the guaranty became worthless in the taxable year so as to sustain a bad debt deduction.

II

Even assuming the taxpayer was a member of a joint venture, it is not shown to be entitled to deduct a loss under Section 182 of the Code

Taxpayer claims the right to deduct the amount of $22,229.37 under Section 182 (c) of the Internal Revenue Code (Appendix, *infra*) which allows a partner to deduct his distributive share of the ordinary net loss of the partnership, computed as in Section 183 (b). Section 183 (a) (Appendix *infra*) provides that the net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, and Section 183 (b) (2) (B) (Appendix, *infra*) provides that after segregating gains and losses from sales or exchanges of capital assets, the ordinary net loss shall consist of the excess of the deductions over the gross income. Thus, even assuming *arguendo* that the taxpayer became a member of a joint venture in 1943, which as already shown is treated as a partnership for tax purposes, its right to a deduction under Section 182 (c) depends on its having established the partnership's excess of deductions over gross income and its distributive share of that excess.

There is nothing in the record to show what deductions and income the joint venture had for 1943, what its loss if any was, and what the taxpayer's

distributive share was.[5] As stated (fn. 3, *supra*), the joint venture apparently filed no return for that year. In any case, it is clear that the amount borrowed from Pacific would not be an allowable deduction to the joint venture by virtue of the obligation to repay it. No section of the Internal Revenue Code permits a deduction merely because borrowed money has to be repaid. No other basis for allowing the venture to deduct the borrowed money has been suggested. (Cf. R. 39–40.) It follows that because the amount borrowed does not represent an allowable deduction to the joint venture in 1943 and because distribution of its loss if any for that year was not otherwise shown, the taxpayer is not entitled to any deductions under Section 182 (c) in 1943.

III

The Tax Court did not abuse its discretion in denying the request of taxpayer's counsel for additional time to prepare his case

It is perhaps unfortunate that the counsel taxpayer first procured failed it at the last moment. Nevertheless, we feel that the Tax Court did not abuse its discretion in denying the request of taxpayer's counsel for more time to prepare his case and we feel, moreover, that even if there were an abuse, it was not

[5] The books for the partnership composed of Otto, Balestrieri and Hoff were in court at the hearing but were not introduced in evidence (R. 29–30). From this book Otto testified only that the closing balance due Pacific was $22,229.37. There was no evidence as to the amount of the loss shown by these books, if any, on the milling venture.

prejudicial. (The discussion between taxpayer's counsel and the court is found at pp. 11–12 of the record.)

It appears from the discussion between counsel and the court that Mr. Janin had a full day to work on preparation. He was notified on the morning of the hearing day that he would definitely have the case to present. The hearing commenced at 5:30 p. m. Counsel's colleague pointed out between 12:05 and 12:10 that Mr. Janin had already been working on the case. He had been notified the day before that he might have to present the case. Moreover, the afternoon session on March 25, which was the day of definite notification of Mr. Janin's pending task, lasted only twenty minutes, leaving counsel a full evening before the next day's session.[6]

Taxpayer's counsel may have endured some hardship in preparing his case in the time available. It may have been inconvenient to work at night. But the issue involved does not seem so difficult that the time available for preparation was insufficient. It is submitted that the Tax Court did not abuse its discretion. Had it postponed the trial the inconvenience to court and counsel for the Commissioner might have been equal to whatever inconvenience was caused to counsel for taxpayer.

Taxpayer's main plaint in regard to the court's refusal to extend time to counsel was that taxpayer

[6] Taxpayer states in his brief that Mr. Janin was compelled to attend the 2:00 p. m. session of court on March 25. This is not borne out by the record which shows that at 12:10 p. m. the court adjourned until 5:30 p. m. (R. 13.)

was denied a fair and full hearing. This is not borne out by the record, which shows certainly a fair hearing and also that ample evidence was introduced by taxpayer fairly to present the issues. Indeed, it is to be noted in this connection that the taxpayer has not referred to any additional material evidence not known to counsel at the time of the hearing which would change the result if now introduced into the record. It would seem then that the Tax Court's action was not prejudicial.

CONCLUSION

The Tax Court's decision, being in accord with established legal principals and amply substantiated by the evidence, is not clearly erroneous and should be affirmed.

Respectfully submitted.

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May 1949.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

*   *   *   *   *

(f) *Loss by corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

*   *   *   *   *

(k) *Bad debts.*—

(1) *General rule.*—Debts which become worthless within the taxable year; * * *

*   *   *   *   *

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

*   *   *   *   *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b). (26 U. S. C. 1946 ed., Sec. 182.)

SEC. 183. COMPUTATION OF PARTNERSHIP INCOME.

(a) *General rule.*—The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except as provided in subsections (b) and (c).

(b) [As amended by Section 150 (g) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Segregation of items.*—

(1) *Capital gains and losses.*—There shall be segregated the gains and losses from sales or exchanges of capital assets.

(2) *Ordinary net income or loss.*—After excluding all items of gain and loss from sales or exchanges of capital assets, there shall be computed—

(A) An ordinary net income which shall consist of the excess of the gross income over the deductions; or

(B) An ordinary net loss which shall consist of the excess of the deductions over the gross income.

* * * * *

(26 U. S. C. 1946 ed., Sec. 182.)

Sec. 3797. Definitions.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3797.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.3797–4. *Partnerships.*—The Internal Revenue Code provides its own concept of a partnership. Under the term "partnership" it includes not only a partnership as known at common law, but, as well, a syndicate, group, pool, joint venture, or other unincorporated

organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. On the other hand the Code classifies under the term "corporation" an association or joint-stock company, the members of which may be subject to the personal liability of partners. If an organization is not interrupted by the death of a member or by a change in ownership of a participating interest during the agreed period of its existence, and its management is centralized in one or more persons in their representative capacities, such an organization is an association, taxable as a corporation. As to the characteristics of an association, see also sections 29.3797–2 and 29.3797–3. The following examples will illustrate some phases of these distinctions:

(1) If A and B buy some acreage for the purpose of subdivision, they are joint adventurers, and the joint venture is classified by the Code as a partnership.

(2) A, B, and C contribute $10,000 each for the purpose of buying and selling real estate. If A, B, C, or D, an outside party (or any combination of them as long as the approval of each participant is not required for syndicate action), takes control of the money, property, and business of the enterprise, and the syndicate is not terminated on the death of any of the participants, the syndicate is classified as an association.

California Civil Code:

SEC. 2787. *Sureties, guarantors, distinction abolished—definition.*—[11] The distinction between sureties and guarantors is hereby abolished. The terms and their derivatives, wherever used in this code or in any other statute or law of this State now in force or hereafter enacted, shall have the same meaning, as here-

after in this section defined. A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor. Guaranties of collection and continuing guaranties are forms of suretyship obligations, and except in so far as necessary in order to give effect to provisions specially relating thereto, shall be subject to all provisions of law relating to suretyships in general.

U. S. GOVERNMENT PRINTING OFFICE: 1949